LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 27 1968
JOHN F. DAVIS, CLERK

No. 1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

GEORGE SCHUMANN; ET UX, ET AL.,

Respondents.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

Claude L. Mullis, Sr.
William Lee Allen
1103 City Hall
Jacksonville, Florida 32202
Counsel for Petitioner

INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT	4
HOW FEDERAL QUESTION IS PRESENTED	9
REASONS FOR GRANTING THE WRIT	9
CONFLICT	9
IMPORTANCE	10
ERROR IN COURT BELOW	13
CONCLUSION	16
APPENDIX A - STATUTES, REGULATIONS	17
(1) Federal Aviation Act of 1958, Section 101(24), 49 U.S.C. §1301(24)	17
(2) Federal Aviation Act of 1958, Section 104, 49 U.S.C. §1304	17
(3) Federal Aviation Act of 1958, Section 307(a), 49 U.S.C. §1348(a)	17
(4) 14 C.F.R. 60.17 (F.A.R. 91.79)	17
(5) Florida Appellate Rule 4.5c(6)	18

Page

APPENDIX B - OPINIONS OF LOWER COURTS 19

(1) (Interlocutory) First District Court of Appeal 19

(2) Circuit Court of Duval County 37

(3) First District Court of Appeal - Opinion 49

(4) First District Court of Appeal - Rehearing denied 54

(5) First District of Court of Appeal - Certification suggestion denied 55

(6) Supreme Court of Florida - Certiorari denied 56

(7) Supreme Court of Florida - Rehearing denied 57

CASES CITED

Avery v. United States, Ct. Claims 1964, 330 F. 2d 640 9

Batten v. United States, Tenth Circuit 1962, 306 F. 2d 580 9

Causby v. United States, 328 U.S. 256 ..... 11, 12, 13, 15

Griggs v. Allegheny County, 402 Pa. 411, 168 A. 2d 123 ..... 11, 12

Griggs v. Allegheny County, 369 U.S. 84 ..... 11, 12, 15

United States v. Brondum, Fifth Circuit, 272 F. 2d 642 15

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Respondents.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, First District

of Florida, entered in the above entitled cases, consolidated for trial and appeal purposes, on June 15, 1967.[1]

CITATIONS TO OPINIONS BELOW

The opinion of the District Court of Appeal on interlocutory appeal, printed in Appendix B hereto, infra, p. 19 is reported in 167 So. 2d 95. The memorandum opinion of the Circuit Court (R-79) is unreported and is printed in Appendix B hereto, infra, p. 37. The opinion of the District Court of Appeal on final judgment printed in Appendix B hereto, infra, p. 49, is reported in 199 So. 2d 727.

JURISDICTION

The judgment of the District Court of Appeal, First District of Florida, was entered on June 15, 1967 (R-784). A timely petition for rehearing (R-789), and suggestion that the decision be certified as passing upon a question of great public interest (R-792), filed on June 23, 1967, were denied on July 10, 1967 (R-796-7). A timely petition for a writ of certiorari to the Supreme Court of Florida filed July 21,

---

[1]RESPONDENTS - SCHUMANN. George Schumann, Emilie Schumann; Lee J. Porter, Margie C. Porter; William Henry Lewis, Evelyn Howard Lewis; Allen K. Johnson, Laura Johnson; Howard F. Bell, Marguerite S. Bell; L. G. Zorn, Sr., Rilla Zorn; Ethel Louise Martin Henthorn; Maribelle Pendley McWhorter; Cleo E. Goff, Lucille Goff; William T. Key, Nelda E. Key; Conrad Markle, Jr., Earleen Markle; Anthony L. Becker, Helen A. Becker; Neil S. Wilson, Lonie B. Wilson; Bertha J. Wilson; David Vernon Edwards, Gladys Verna Edwards; Paul M. Mulligan, Leila Mulligan; John L. Ganey, Blanche M. Ganey; Arnold R. Hagen; Robert Charles Hosker, Julia Belle Hosker; Charles H. Hosker; Hugh Doyle Colding, Hazel L. Colding; Roger E. Ferrell, Frances Lucille Ferrell; Giles V. Cline, Helen L. Cline; Major Ray Suggs, Mary Itus Suggs, Ida L. Broward; Elizabeth Mae Powers, Aaron William Powers; Hoyt E. Broward, Margaret Ann Broward; Louie Lee Broward, Mary Agnita Broward; Trenton A. Blanton, Elizabeth D. Blanton. BRAIN. Edwin H. Brain, Lucille M. Brain; Anna Lee Welch, Everett L. Welch.

1967 (R-798) was denied on October 5, 1967 (R-847). A timely petition for rehearing filed on October 17, 1967 (R-848) was denied on November 1, 1967 (R-850). The jurisdiction of this court is invoked under 28 U.S.C. §1257(3) since a right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of the United States.

QUESTIONS PRESENTED

I

Whether a state can hold a municipal operation of an airport liable for the taking of an easement in property by virtue of noise, vibrations, smoke and the like emanating from flights of commercial and military jet aircraft originating from its airport, when the flights are in the navigable airspace of the United States at altitudes above the 500 foot minimum safe altitude of flight prescribed by regulations issued under 49 U.S.C. §1301 et seq., when such flights do not take place over the property of the complaining owner, and when such flights are lawfully conducted in the manner required by all applicable federal rules and regulations.

II

Whether it constitutes an unconstitutional burden on interstate commerce for a state constitutional provision, against the taking of property without just compensation, to be construed so as to impose liability as a result of lawfully conducted flights in the navigable airspace of the United States at altitudes above the 500 foot minimum safe altitude of flight prescribed by regulations issued under 49 U.S.C. §1301 et seq?

III

Whether a state can hold a municipal owner of an airport liable for the taking of an easement in property by virtue of noise, vibrations, smoke and the like emanating from the ground operation of military jet aircraft under the air defense command of the United States, on premises leased to the United States for its exclusive use and control, when the federal courts have consistently held under such circumstances that there is no fifth amendment taking by the United States; even when the United States is owner and operator.

STATUTES INVOLVED

The statutory provisions involved are Sections 101(24), 104 and 307(a) of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. §§1301(24), 1304 and 1348(a). The regulation involved is F.A.R. 91.79, 14 C.F.R. 60.17. They are printed in Appendix A, infra, pp. 17, 18.

STATEMENT

The municipal airport of the City of Jacksonville has been in existence since prior to World War II (R. 5-6). There are three runways: the East-West runway (9-27), the Southeast-Northwest runway (12-30) and the Northeast-Southwest runway (5-23) (R-780). In 1962, a 1000 foot extension was made to the northeast end of the Northeast-Southwest runway (5-23) by the United States Army Corps of Engineers, at the request of the Air Defense Command of the United States, because of the use of the field by the Florida Air National Guard, a component of such Command (R-172). The use of the field is pursuant to a lease between the United States and petitioner, whereby the Air Guard has exclusive possession of a portion of the field, and the right

to operate therefrom, with an agreement to indemnify and hold petitioner harmless for all claims for demands or damages arising out of the use or occupancy of the field by the Guard (R-14) (Appendix B, infra, p. 40). The extension of the runway was completed on December 11, 1962 (R-172).

A look at the attached drawing[2], respondents' exhibit 4, an aerial photograph, (R-780), and petitioner's exhibit 14, a map[3], will give a clear indication of the relative locations of the airport, respondents' properties and the area acquired by petitioner outside the airport boundary, at the northeast end of the Northeast-Southwest runway. (This area divides the Cedar Bay residential area into two parts (R-6).

In 1963, respondent property owners living along Cedar Bay Road, the road running easterly and westerly along the northern boundary of the municipal airport, (R-5 & 103) (R-780) brought an inverse condemnation action against petitioner, seeking to require petitioner to exercise its power of eminent domain as to their respective properties, alleging a taking thereof by petitioner in violation of the Constitution and laws of the State of Florida and the United States (R-10 & 108). The taking was alleged to have occurred because of the use of extended runway 5-23 by commercial jets, and those of the Florida Air National Guard (R-8 & 105).

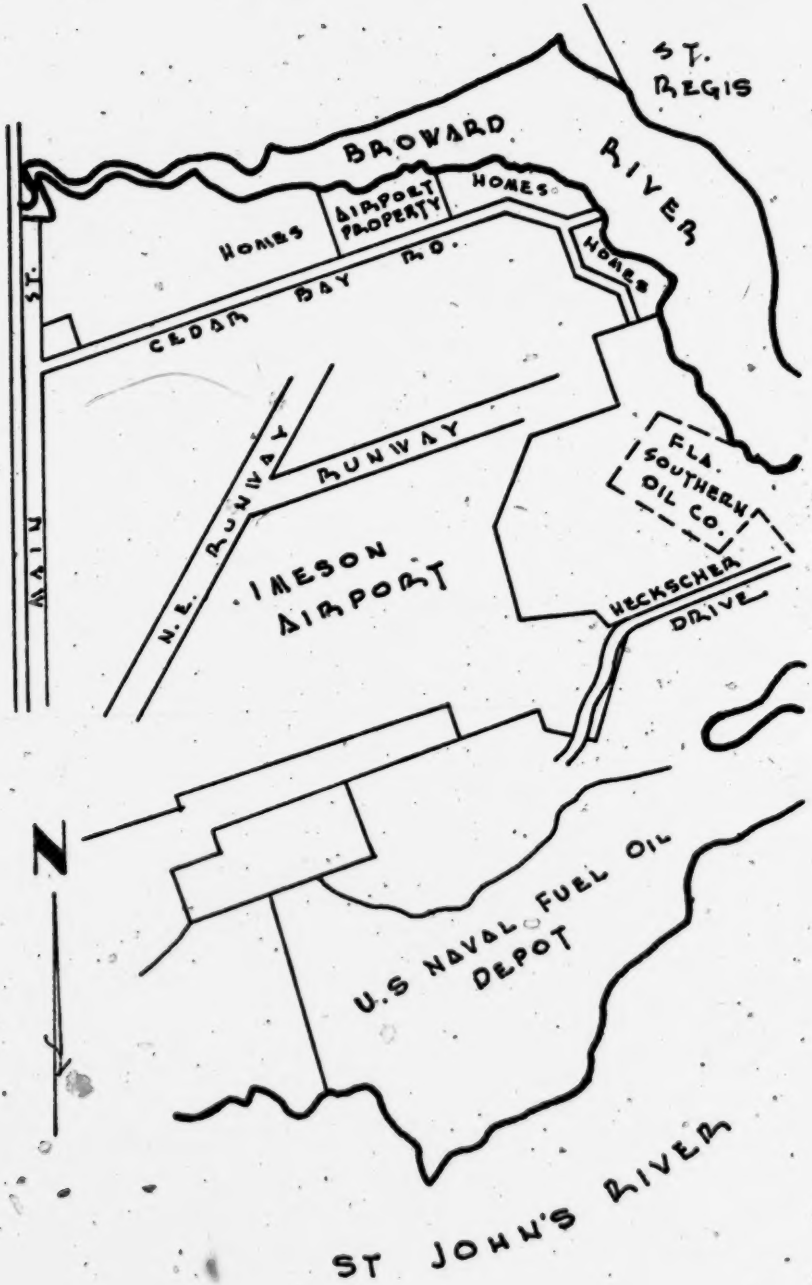
In its answer, petitioner raised the following defense:

> The United States Congress, by the Federal Aviation Act of 1958, 49 U.S.C.A. 1301, et seq., re-enacted a public right of freedom of transit through the navi-

---

[2]Adapted from sketch appearing in Burritt v. Harris, Fla. App. 1964, 166 So. 2d 168 at page 177, a property rezoning case involving lands adjoining the airport and Cedar Bay Road.

[3]Forwarded to the Clerk of this Court, pursuant to Rule 38, by mail on January 16, 1968.


ST. REGIS
BROWARD
RIVER
HOMES
AIRPORT PROPERTY
HOMES
HOMES
CEDAR BAY RD.
MAIN ST.
N.E. RUNWAY
RUNWAY
IMESON AIRPORT
FLA. SOUTHERN OIL CO.
HECKSCHER DRIVE
N
U.S NAVAL FUEL OIL DEPOT
ST JOHN'S RIVER

gable airspace thereby exempting lawful flights of aircraft in the navigable airspace from noise damage claims by landowners, under any circumstances short of such severe interference as would constitute a taking of the landowners' properties without due process of law. (Schumann Sixth Defense (R-14) (Brain Fifth Defense (R-112).

On motion of respondents, the defense was stricken (Schumann R-32) (Brain R-127). After trial of the issues, the lower court found a taking of a temporary easement[4] in the properties of all the respective properties of respondents on the basis of takeoffs, landings and ground operation of the jet, commercial and Air National Guard aircraft (R-90 & 140).

The evidence was that, with respect to respondents' properties, on takeoff the planes were above the 500 foot minimum altitude of flight[5], established by regulation promulgated by the Administrator of the Federal Aviation Agency pursuant to 49 U.S.C. §1348(a)[6], and did not normal-

---

4". . . a temporary easement which it has taken in fact in the properties of those plaintiffs which are within one-half mile of each side of the Northeast-Southwest runway, including a distance of 3,000 feet from its Northeast end, for the purpose of permitting any plane to make noises, emit gases, fumes and smoke, to cause vibration and concussion, and to disturb or blast dust and small particles of matter against and onto plaintiffs' properties, for the period beginning December 11, 1962, and ending December 11, 1968 . . ." (R-90) (Appendix B, infra, p. 47).

5Captain Royall testified that his aircraft would be at an altitude of 400-600 feet when crossing the airport boundary (R 650). Captain Simon stated his altitude at the end of the runway would be 300-500 feet, sometimes higher (R 740), and that his altitude crossing the river would be approximately 1000 feet (R 741). Captain Jamieson, who had actually checked his altitudes, gave them as 400 feet at the Northeast end of runway 5, 800 feet at Cedar Bay Road, 1200 feet at the south bank of the river and 1600 feet at the north bank (R 763).

6"Except when necessary for takeoff or landing, no person shall operate an aircraft below the following altitudes:

* * *

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle or structure. . ." 14 C.F.R. 60.17 (F.A.R. 91.79).

ly fly over respondents properties. On landing on runway 23, heading southwest, the planes were apparently below 500 feet, but did not fly over the respondents' properties. All flights were within normal take off and approach areas to the airport, and the glide path to runway 5-23 does not extend over the property of any of the respondents.[7]

On appeal, the striking of the defense that the flights occurred in the navigable airspace of the United States was assigned as error:

> The lower court erred in striking defendant's sixth defense (Schumann R-96).
>
> The lower court erred in striking defendant's fifth defense (Brain R-159).

The assignment of error in each case was argued as point one in the brief in each case, thusly:

> Whether or not the court erred in finding that plaintiffs are entitled to be compensated for the taking of their property as the result of the flight of jet aircraft in the navigable airspace of the United States.

The decision of the lower court was affirmed, *City of Jacksonville v. Schumann*, Fla. App. 1967, 199 So. 727 (Appendix B, infra, p. 49). Petition for certiorari to the Supreme Court of Florida, within the narrow confines of Florida Appellate Rule 4.5c(6) was denied (Appendix A, infra, p. 18).

---

[7]Captain Mayes, United Airlines (R 593-616); Carl Leavitt, F.A.A. (R 617-623); Colonel Moore, Air Guard (R 625-641); Captain Royall, National Airlines (R 642-682); Captain Simon, Delta Airlines (R 737-752); Captain Jamerson, Eastern Airlines (R 753-768).

HOW FEDERAL QUESTION IS PRESENTED

Summarizing the statement of the case, supra, in this regard, the defense of a public right of transit in the navigable airspace of the United States pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq. was raised in petitioner's answer, stricken by the trial court, this action assigned as error on appeal and argued in the briefs. The District Court of Appeal affirmed the trial court, and the Supreme Court of Florida denied certiorari.

REASONS FOR GRANTING THE WRIT

1. CONFLICT — The decision of the court below is in direct conflict with the decisions of the Tenth Circuit Court of Appeals in *Batten* v. *United States*, 306 F. 2d 580 (1962), cert. den. 371 U.S. 955; and the United States Court of Claims in *Avery* v. *United States*, 330 F. 2d 640 (1964). As stated by the court in Batten:

> "This case presents the novel question whether a taking of property, compensable under the Fifth Amendment, occurs when there is no physical invasion of the affected property but the operation and maintenance of military jet aircraft on an air force base of the United States produce noise, vibration and smoke which interfere with the use and enjoyment of the property." 306 F. 2d at 581.

The Avery case involved property owners adjoining the Naval Air Station in Sanford, Florida, and presented the same question involved in Batten. The statement of the court as to certain of the properties is pertinent:

> "Aside from rare emergency situations, there were no flights directly overhead at less than 500-foot altitude over these parcels. Consequently, under the

> law as it is now enacted and construed, there is no compensable taking of easement on these parcels, — the inconvenience and injury to the property being "incidental" and "unavoidably attendant" to the use of the airways. Alva A. Aaron, et al. v. United States, Ct. Cl. No. 489-58, decided January 11, 1963; Matson v. United States, 145 Ct. Cl. 225, 171 F. Supp. 283 (1959); Richards v. Washington Terminal Co., 233 U.S. 546, 555 (1914); Campbell v. United States, 266 U.S. 368 (1924)." 330 F. 2d at 643.

In this area there should not, and cannot, be a conflict in opinions of the state and federal courts. If States were free to construe the "taking" provisions of their constitutions in such a manner as to impose liability, jet air travel, with its obvious effect and impact on interstate commerce, would be either destroyed, severely curtailed, or burdened with exorbitant landing fees to reimburse the airport operator for the expense of acquiring easements for "incidental" injury.

2. IMPORTANCE — This case is of extreme national importance, affecting not only petitioner, but the municipal or authority operators of any jet airport, and their multitudinous citizens and taxpayers. At stake is the power of Congress to define and regulate the navigable airspace of the United States. If Congress has the power to define navigable airspace as:

> "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft. 49 U.S.C. §1301 (24)

and regulate it by providing that:

> There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States. 49 U.S.C. §1304,

its power would include the right of those using the public airspace[8] to be free from any claims for a taking of property.

This court has not decided any case involving the taking of non-overflight property by the flight of aircraft in the navigable airspace of the United States. *Causby* v. *United States*, 328 U.S. 256, involved flights over the land "so low and so frequent as to consitute a direct and immediate interference with the use and occupancy of the land", but at that time Congress had not defined navigable airspace as that including the "airspace needed to insure safety in takeoff and landing of aircraft".

The same situation existed at the time of the over flights in *Griggs v. Allegheny County*, 369 U.S. 84. Although the decision of this Court was not rendered until March 5, 1962, it appears from the opinion of the Pennsylvania Supreme Court (*Griggs v. Allegheny County*, 402 Pa. 411, 168 A. 2d 123) that the flights in that case took place before the enactment of the Federal Aviation Act of 1958. This act was adopted August 23, 1958, and the provision that the navigable airspace includes airspace needed for takeoff and landing did not take effect until December 31, 1958, sixty days after the first Administrator was appointed. (See Section

---

[8]Either above the minimum safe altitude of flight established by regulation (500 feet in this case) or in take off and landing. Certainly, where there are no over-flights of the respondents' lands and the easement ordered taken is neither a clearance (obstruction) easement nor an avigation (flight) easement, which are susceptible of definition, but rather what might be termed an "enviromental easement", which defies definition.

1505(2) of the Act). In his opinion, the Pennsylvania Chief Justice stated (168 A. 2d at 124) that Griggs filed his petition on May 29, 1958, a date seven months before the Federal Aviation Act took effect. The flights upon which the cause of action in the Griggs case was predicted of necessity took place prior to that date, and at a time when the below quoted provisions of the Air Commerce Act and the Civil Aeronautics Act were in effect. It also appears from the State Court opinion (168 A. 2d at 124), that the Griggs petition alleged a taking on June 1, 1952, the date on which the airport was opened for public use, which was some six years before the enactment of the Federal Aviation Act. While the provision in the Federal Aviation Act was mentioned by this Court in the Griggs case, there is nothing to suggest a belief that it would have a retroactive effect. It would seem that at the time of the flights in the Griggs case, the navigable airspace was as defined in the Civil Aeronautics Act and the Civil Aviation Act, i. e., the airspace above the minimum safe altitudes prescribed by regulation. The Pennsylvania Court also mentioned a regulation prescribing such altitudes "except where necessary for takeoff or landing", but apparently did not feel that this phrase had the effect of prescribing minimum altitudes for takeoff or landing.

The Griggs case, therefore, like the Causby case, is one dealing with over flights outside the navigable airspace. As yet there has been no decision by this Court with respect to liability for noise and interference caused by aircraft flying within the navigable airspace of the United States while taking off or landing, and certainly not where the flights are above the minimum altitude of flight, and are not overflights.

3. ERROR IN COURT BELOW: — Cognizant of the statement in United States v. Causby, supra, that,

> "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." (328 U.S. at 266),

and that, as to their respective properties, any overflights above the 500 foot minimum safe altitude of flight established by regulation, would be in the navigable airspace of the United States, each plaintiff alleged *overflights* below 500 feet (the most common altitude being between 100 - 150 feet), so frequent as to "destroy the value of their properties as residences or other use requiring the presence of human beings or animals" (R 7-8; R-106) (Appendix B, infra, pp. 20-22).

The Trial court found that overflights were not the gravamen of respondents' complaint (Appendix B, infra, pp. 42 & 45), and made no finding as to frequency, except to find that the noise occurs ". . . at frequent intervals and at all times of the day or night . . ." (Appendix B, infra, p. 40). The finding as to the alleged "destruction of the value of the properties or residences", was limited to a determination that, based on the testimony of a real estate appraiser, the fair market value of respondents' properties had been lessened. (Appendix B, infra, p. 41). The testimony of this appraiser is illuminating[9]. None of the numerous respondents had moved from their property as a result of the airport.

---

[9]It is felt that the two questions and answers set forth verbatim below adequately set forth Mr. Barker's testimony.

Q. Mr. Barker, based on your experience in the real estate field and your familiarity with the market, would you tell us what, in your opinion, has been the effect on the market value of the Brain and Welch properties, and the other properties lying within the distance

Petitioner's exhibit 14, a map, forwarded earlier to the Clerk of this Court (see footnote 3, supra)[10] reveals clearly that only five properties of respondents are located south of Cedar Bay Road. Of these, three sets of owners granted petitioner avigation easements while the extended runway was in the process of construction.[11] Thus it is readily apparent that, on takeoff the planes were well above the minimum altitude of flight established by regulation. Captain Jamieson of Eastern Airlines testified that his altitude on takeoff with a DC-8 was 400 feet at the northeast end of runway 5, 800 feet at Cedar Bay Road, 1200 feet at the south bank of the river and 1600 feet at the north bank of the river (R 762-763). This testimony was corroborated by Captain Royall of National Airlines (R-650) and Captain Simon of Delta Air Lines (R 740-741).

Ground operation of jet aircraft has not been held to constitute a "taking" of property within the meaning of any State Constitution or of the Constitution of the United States prior to this case. Herein the court found that residences abutting the warmup pad or parking apron of the Air Guard "especially suffered from dust or other debris", and that the sharp concussion or explosion when the Air

---

of the not more than one-half mile from either side of a prolongation of the center line of this runway since the date of the commencement of use of the runway as extended? (R-268)

A. The construction of the extension of the runway has for a distance of some one-half mile on either side of the center line of the runway caused in my opinion a decrease in the value of the properties within that area. (R-269)

Q. And it is your judgment and opinion that they have been diminished in market value as a direct and proximately result of the extension of that Northeast-Southwest Runway? (R-269)

A. It is my opinion. (R-269)

[10]See also Plaintiffs' exhibit number 4, a vertical aerial photograph of the airport and environs. (R-780)

[11]Becker, October 30, 1962 (R-52); Key, September 26, 1962 (R-55); Goff, August 1, 1962 (R-58).

Guard fighter jets afterburner was used was a particular bone of contention (Appendix B, infra, p. 40).

The decision of the trial court, affirmed by the District Court of Appeal, requires petitioner to condemn an "environmental"[12] easement(R 90 & 140) (Appendix B, infra, p. 47, despite the fact that the only two recognized types of aviation easements are clearance (obstruction) easements, and avigation (flight) easements. *United States v. Brondum*, Fifth Circuit, 272 F. 2d 642.

Unlike Causby, supra, there was no path of glide passing over the properties of any of the respondents, no overflights and no destruction of the use of the property. This is not the case of an elevated railway passing over respondents' lands.

Again, unlike Griggs, supra, there is no path of glide passing over any of respondents properties, no overflights, and no removal from the premises. This is not the case of a bridge without approaches.[13]

Additionally, in the instant case, there is a failure of proof of frequency as existed in Causby, supra, (328 U.S. at 259) and Griggs, supra, (369 U.S. at 87) A good example of the *lack* of "frequency" is the testimony of plaintiff Broward as to being awakened at night by planes taking off. He actually gave dates and times (R-209), but can once a night on October 7, 10, 11, 12, 13, 15, 18 and twice on October 16 and 19 be considered "frequently"?

---

[12]See footnote 4 above.

[13]On takeoffs, when the noise and vibrations were greater, the planes would have gotten onto the "bridge" prior to flying near respondents' properties.

The state court thus erred in striking the defenses that the flights complained of took place in the navigable airspace of the United States, as the evidence shows clearly that the takeoff and landings are the main complaint of respondents (R. 81-82), and without consideration of flights in the navigable airspace of the United States, either above the minimum altitude of flight established by regulation, or while taking off and landing, the evidence would not, and could not, support a finding of a taking.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Claude L. Mullis, Sr.

William Lee Allen
1103 City Hall
Jacksonville, Florida 32202

Counsel for Petitioner

APPENDIX

APPENDIX A

STATUTES

FEDERAL AVIATION ACT OF 1958

SECTION 101 (24) 49 U.S.C. §1301 (24) NAVIGABLE AIRSPACE

" 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in takeoff and landing of aircraft."

SECTION 104, 49 U.S.C. §1304, PUBLIC RIGHT OF TRANSIT

"There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

SECTION 307(a), 49 U.S.C. §1348(a) AIRSPACE CONTROL

"The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest."

REGULATIONS

14 C.F.R. 60.17 (F.A.R. 91.79) MINIMUM SAFE ALTITUDES

"Except when necessary for take off or landing, no person shall operate an aircraft below the following altitudes:

(a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

(b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft . . .

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. . . ."

COURT RULE

FLORIDA APPELLATE RULE 4. 5c(6) PETITION FOR CERTIORARI FROM DISTRICT COURT TO SUPREME COURT

"Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision."

APPENDIX B

INTERLOCUTORY APPEAL

DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

167 So. 2d 95

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Appellant,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Appellees.

DECISION

CARROLL, DONALD, Acting Chief Judge,

The defendant city in an action for "inverse condemnation" has filed this interlocutory appeal from an order entered by the Circuit Court for Duval County, denying its motions to dismiss and strike addressed to the plaintiff's second amended complaint.

In this appeal the principal question before us for determination is whether the said complaint sufficiently alleges a cause of action against the defendant. A secondary question is whether certain portions of the said complaint should have been stricken pursuant to the defendant's said motion to strike.

The basic allegations of the plaintiffs' second amended complaint are substantially as follows: That the plaintiffs,

57 in number, are the owners of lands on which they reside, in close proximity to the Imeson Airport, which is owned and operated by the defendant, a municipal corporation. That the city, commencing during World War II and thereafter, embarked upon a program of expanding the airport, acquiring additional lands both by purchase and by condemnation, some of it lying between the plaintiff's properties and the original airport location. That in 1962 the city completed an extension of the Northeast-Southwest main runway, under the directives and requirements of the Federal Aviation Agency for instrument runways, in order that the airport would become fully qualified to handle airplanes, both military and commercial, propelled by turbojet engines. That the Northeast end of this extension of the runway abuts a county road running through the plaintiffs' residential area and the approach to that end bisects the said road, so that the said area has been severed and cut into two parts, lying on either side of the end of the extended runway. That the city provides facilities at the airport for the Florida Air National Guard, and maintains a squadron of jet fighter pilots who currently fly military fighter planes "which are the fastest and most powerful (and consequently noisiest) fighter planes in the world." That the city also provides landing and take-off facilities for several commercial airlines, which daily operate approximately 90 flights in and out of the airport, at all hours of the day or night, using jet transport planes, most of them four-engined.

The plaintiffs further allege in their said complaint: That the said planes, both military and commercial, are operated every day through the air space above the plaintiffs' properties, at altitudes usually below 500 feet, the most common altitude being between 100 and 150 feet, with some flights

below 100 feet. That all of the plaintiffs' said properties are within the area designated and defined by the Federal Aviation Agency as "Area Recommended for Non-Residential Development and The Exclusion of Places of Public Assembly" in the Aircraft Noise Abatement Guide, published by the said agency in 1960 for the use and guidance of airport owners and operators who desire to provide airport facilities for the operation of jet-propelled aircraft.

The plaintiffs then allege in their second amended complaint that, by reason of the close proximity of the plaintiffs' properties, jet aircraft operated by the said Air National Guard and the said commercial airlines at times pass over the said properties at altitudes below 500 feet, the greater number of flights occuring at altitudes ranging from 100 to 150 feet; that while the said aircraft pass over the said properties or in close proximately thereto, and while landing, taking off, and warming up, and particularly while advancing the engines to near maximum power on the warm-up pads and taxiing strips appurtenant to the runways, the aircraft engines cause to be heard and felt "terrific and overwhelming vibrations, concussions and sound waves directed and transmitted from said engines" against and upon the plaintiffs' properties; that there are also emitted from the said engines "exhaust fumes, fuel gasses and heavy black smoke which are directed and transmitted" against and upon the said properties, which gasses, fumes, and smoke carry with them "dust, debris, earth, and stones" which are propelled against and upon the said properties: that the said vibrations and concussions cause dishes and windows to rattle in the plaintiffs' homes and make it impossible for the plaintiffs and members of their familites to carry on any conversation, and on occasion have caused structural damage to the plaintiffs' residences and have caused objects to fall from tables and shelves.

On the subject of damages the plaintiffs allege in their said complaint that the above conditions occur at all hours of the day and night and at all times during the week, to the permanent injury and damage to their properties; that they are unable to secure an uninterrupted night's sleep due to the irregularity of the said flights of jet planes; that the plaintiffs have suffered great physical and mental discomfort, fear, and distress from the operations of the airport, particularly since the advent of jet planes, and the value of their properties "as residences or other use requiring the presence of human beings or animals has been destroyed." The plaintiffs re-aver their allegation that all of their properties are within the area recommended by the Federal Aviation Agency as not suitable for residential development.

In paragraph numbered V of their said complaint, the plaintiffs reveal what they conceive to be the nature of their cause of action against the defendant city, as follows:

> "As a direct and proximate result of the increased operation of jet planes from Defendant's Imeson Airport, which increased operation has taken place within the past two years, the Defendant has deprived the Plaintiffs of the free and unmolested use and quiet enjoyment of their respective properties, and Defendant has, by so doing, exercised dominion and control over, appropriated, confiscated and condemned "the properties of the Plaintiffs, without just compensation, and without due process of law, contrary to the Constitution and laws of the State of Florida and of the United States of America."

In paragraph VI of their said complaint the plaintiffs allege that by reason of the above-described conditions and of the depriving of the plaintiffs of their free and unmo-

lested use and quiet enjoyment of their properties, and of the "confiscation and condemnation of their properties by the defendant the Federal Housing Administration and the Veterans' Administration" will not insure or guarantee any loan to any person to buy, build, or construct any home or other building on the plaintiffs' properties, and "no bank or other prudent lending institution will make a loan to any person for such purposes," and that: "By reason of these conditions, plaintiffs' properties have been condemned and made useless, as residential property, by the defendant, without due process of law, contrary to the Constitution and laws of the State of Florida and of the United States of America."

In paragraph VII the plaintiffs allege that, in conjunction with the defendant's expansion of the airport and in pursuance to a resolution adopted by it, the defendant had filed in the Duval County Circuit Court a condemnation action against certain of the plaintiffs, seeking to take an easement consisting mainly of the right to enter upon the properties of the said plaintiffs for the purpose of cutting trees and removing other obstructions above a certain height over their properties for the purpose of maintaining a clear zone for the flight of aircraft—the so-called "clearance easement"—but the said plaintiffs cannot in that action compel the city to condemn more property or any greater interest.

Finally, in the eighth and last paragraph of their said complaint, the plaintiffs allege that the operation of the said airport, as expanded by the defendant, "constitutes a continual trespass against the properties of the plaintiffs, or a nuisance equivalent to the imposition of a servitude upon the properties of the plaintiffs. Plaintiffs are thus irreparably injured, and their only relief is in equity.'

The prayer of the plaintiffs at the conclusion of their complaint is as follows:

> "WHEREFORE, Plaintiffs pray that an injunction issue against the Defendant prohibiting further continuance of the trespass or nuisance, or in the alternative that the Defendant be required to exercise its right of eminent domain as a means of making restitution to the Plaintiffs, and each of them, and that the Defendant pay to the Plaintiffs such attorney's fee as to the Court seems reasonable."

To the foregoing second amended complaint the defendant city duly filed its motion to dismiss and motion to strike. The stated ground for its motion to dismiss is that the said complaint fails to state a cause of action against the defendant. In its motion to strike the defendant moves to strike paragraphs VI and V of the said complaint and certain parts of paragraph IV on the grounds that the said allegations are "redundant, irrelevant, immaterial and seek to assert improper elements of damage against this defendant." From the order of the Circuit Court denying the defendant's said motions to dismiss and to strike,the defendant has taken the instant interlocutory appeal.

While the plaintiffs' second amended complaint does not contain the expression "inverse condemnation," it is apparent from the allegations of the complaint, and it is clear from the statements and contentions made by the plaintiffs in their appeal brief, that they are attempting to allege in their complaint a cause of action in inverse condemnation, as an alternative to the remedy of injunctive relief. This effort makes this a case of first impression in Florida, for we know of no decision in this state specifically recognizing inverse condemnation based upon airport operations.

In several jurisdictions, both state and federal, the courts have upheld inverse condemnation as a legally-recognizable cause of action, and it is our problem in the present appeal to determine whether such a cause of action should be recognized in the courts of Florida.

Inverse condemnation has been defined as the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. Thornburg v. Port of Portland, 233 Or. 178, 376 P. 2d 100 (1962); Martin v. Port of Seattle, 391 P. 2d 540 (Wash. 1964). To the same effect but using different words, the New York Supreme Court, Appellate Division, in Trippe v. Port of New York Authority, 17 A. D. 2d 472, 236 N. Y. S. 2d 312 (1962) said that inverse condemnation is a method of compensation wherein "an owner asserting a claim for appropriation of his property may pursue his right by an action in equity for an injunction and for damages; the court may then, as an alternative to the injunction, make an award for the taking . . . ."

Apparently the leading case decided by the state courts involving an action for inverse condemnation against an airport authority charging a taking on account of a noise nuisance, is Thornburg v. Port of Portland, 233 Or. 178, 376 P. 2d 100, decided by the Supreme Court of Oregon in 1962. In that case the plaintiffs owned and resided in a dwelling house located about 6,000 feet beyond the end of a certain airport runway and directly under the glide path of aircraft using it, and about 1,500 feet beyond the end of a second runway, but about 1,000 feet to one side of the glide path of aircraft using that runway. This action in inverse condemnation was brought by the plaintiffs against the Port of

Portland, which owned and operated the airport in question, the Portland International Airport. The defendant had the power of eminent domain and had used it to surround itself with a substantial curtilege, but its formal acquisition stopped short of the plaintiffs' land. The plaintiffs contended that flights from both of the said runways resulted in a tking of their property. Their principal complaint was that the noise from jet aircraft made their land unusable. The two theories of their case were: that systematic flights directly over their land cause a substantial interference with their use and enjoyment of their land, which interference constitutes a nuisance, a continuing nuisance which, when maintained by government, amounts to the taking of an easement, or, more precisely, presents a jury question whether there is a taking; and, secondly, that systematic flights which pass close to their land but not directly over it, constitute the taking of an easement, for the same reasons. At the trial the jury denied to the plaintiffs the compensation which they sought in their action, and the plaintiffs appealed.

In a scholarly opinion in the Thornburg case, the Supreme Court of Oregon said that the specific question before it was "whether a noise-nuisance can amount to a taking." In discussing decisions involving this point, the court further said:

> "Since United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L.Ed. 1206 (1946), and particularly since Griggs v. Allegheny County, 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962), we know that easements can be taken by repeated low-level flights over private land. Such easements have been found in actions against the federal government (Causby) and in actions against municipal corporations (Griggs).

> When such easements are said to have been taken, compensation must be paid to the owners of the lands thus burdened. This much appears to be settled."

After a learned discussion of the authorities on the subject of the noise of jet aircraft amounting to a nuisance and such nuisance ripening into a "taking," the Oregon Supreme Court in the Thornburg case reached the following judicial conclusion:

> "If we accept, as we must upon established principles of the law of servitudes, the validity of the propositions that a noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from above one's land can ripen into a taking if it is persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular.
>
> "If a landowner has a right to be free from unreasonable interference caused by noise, as we hold that he has, then when does the noise burden become so unreasonable that the government must pay for the privilege of being permitted to continue to make the noise? Logically, the answer has to be given by the trier of fact (subject to the usual exercise of the proper function of the court in screening the evidence). See Restatement, Torts, §826, Comment d."

The judgment appealed from was then reversed and the cause remanded for a new trial.

An even more recent case in the state courts involving an action for inverse condemnation against an airport opera-

tor on account of the operations of jet aircraft is Martin v. Port of Seattle, 391 P. 2d 540 (Wash. 1964). As in the case before us, the question confronting the Supreme Court of Washington was whether the plaintiffs therein had stated a claim for relief against the municipal corporation as the owner of an airport. The defendant was the Port of Seattle, owner of the Seattle-Tacoma International Airport, and the plaintiffs were property owners who sought, through this action, damages for the taking or damaging of their property for public use caused by nearby low altitude flights of jet aircraft landing and taking off from the said airport, resulting in a decline in the market value of their properties. The northernmost edge of the litigated area was approximately nine-tenths of a mile from the end of a certain runway, and jet aircraft in the process of landing passed over the central part of the area at altitudes of less than 500 feet. The lands of some of the plaintiffs were subjected to direct overflights of the jet aircraft, while other plaintiffs suffered no overflights. The Washington Supreme Court stated that the gravamen of the plaintiffs' complaint was the noise and vibration created by the jet aircraft rather than the physical invasion. The plaintiffs claimed that, when the said aircraft passed over or in close proximity, conversation is halted, sleep is disrupted, fear is caused, etc., by the noise, and the vibration in the houses makes it necessary periodically to hammer back nails into sidings and to tighten light fixtures, etc. The Supreme Court of Washington agreed with the lower court that the plaintiffs' complaint stated a claim for relief against the defendant, and affirmed the judgment appealed from.

In its discussion of the authorities in this field of law in the Martin case, the Supreme Court of Washington had this to say about the nature of the cause of action in the litigation before it:

> "Whether the 'cause of action' for the recovery of compensation is viewed as resulting from the due process provisions of the Constitution, or as resulting from an adaptation of older ideas of eminent domain and the condemnation of private property for public use, is of little significance. When the noise and intense vibration produced by low-flying jet aircraft deprives the owner of land of an essential element in his relationship to that land, the result should be the same whether the airport operator himself brings the action to 'condemn' the right to so interfere with the land, or the landowner is forced to be the moving party."

In both of the Oregon and Washington cases which we have just discussed, the courts cited and relied upon the following two landmark decisions of the United States Supreme Court:

In the United States v. Causby, 328 U.S. 256, 90 L. Ed. 1206 66 S. Ct. 1062 (1945), the United States Supreme Court held that repeated flights of aircraft at such proximity to the ground as to render property uninhabitable and diminish its value constituted a taking, notwithstanding the fact that the aircraft in their path of glide to and from an airport had conformed to the thirty-to-one glide angle approved by the Civil Aeronautics Authority. The Supreme Court stated that it was a case of first impression and that the problem presented was whether the respondents' property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over the respondents' land at low altitudes. The respondents, Causby and his wife, owned land near an airport leased to the United States in North Carolina, on which land stood their dwelling house and various out-buildings which

were mainly used for raising chickens. The Causbys filed this action against the United States in the U. S. Court of Claims to recover for the alleged taking of their property without compensation by flying airplanes across it at such height as to interfere with its normal use. The Court of Claims rendered judgment for the Causbys, and the United States sought review by certiorari in the Supreme Court. The evidence showed that the flights in question interfered with the normal use of the Causbys' property as a chicken farm and interfered with the night rest of the Causby family. About 150 of their chickens were killed by flying into walls from fright. Production also fell off. The result was the destruction of the property as a commercial chicken farm.

In the Causby case the United States Supreme Court gave the following as its reasoning leading to its conclusion that there had been a taking of the Causbys' property within the meaning of the Fifth Amendment to the Constitution of the United States:

> "We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close

> to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface."

A somewhat analogous situation was before the Supreme Court in the later case of Griggs v. County of Allegheny, 369 U. S. 84, 7 L. Ed. 2d 585, 82 S. Ct. 531 (1962). Griggs had instituted eminent domain proceedings in the Court of Common Pleas of Allegheny County, State of Pennsylvania, which held that there had been a taking by the county, which owned and operated an airport, of an air easement over his property, and fixed compensation therefor. The Supreme Court of Pennsylvania on appeal (County of Allegheny v. Griggs, 402 Pa. 411, 168 A. 2d 123 (1961), held that, if there had been a taking, the county was not liable, and Griggs sought review of this reversal by certiorari in the U. S. Supreme Court, which reversed and held that the interference with Griggs' property amounted to a taking, in the constitutional sense, of an air easement for which compensation must be paid by the county, the owner and operator of the airport (the Greater Pittsburgh Airport).

In the Griggs case, one "approach area," as designed by the county, to the northeast runway passed over Griggs' home, which was 3,250 feet from the end of the said runway. The "slope gradient" of the approach area provided a clearance of 11.36 feet between the bottom of the glide angle and Griggs' chimney. The low-altitude over-flights caused Griggs and the occupants of his property to become nervous and distraught, their sleep was disturbed, etc.

After discussing and re-affirming its holding in the Causby case, supra, the Supreme Court in the Griggs case said

the following on the question as to who took the air easement in the constitutional sense:

> "It is argued that though there was a 'taking', someone other than respondent was the taker — the airlines or the C. A. A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C. A. A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed."

In the final three sentences of its opinion, however, the Supreme Court uses language that we think touches the very heart of the concept of inverse condemnation:

> "Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."

Reverting now to the case before us on this appeal, we think that the allegations in the plaintiffs' second amended complaint fall squarely within the rules laid down in the above-discussed four decisions of the Supreme Court of Oregon, Washington, and the United States, as averring a constitutional taking of their property, requiring the payment to them of just compensation by the owner and operator of the airport. The facts alleged in the plaintiffs' said complaint, are, we believe, substantially the same as the basic facts involved in the said four decisions. This being

so, the sole remaining inquiry is whether there exists any legal reason why the rules recognized in those decisions should not be recognized and applied in Florida. We see no such reason.

This is a case of first impression in this State. We know of no Florida case specifically recognizing inverse condemnation based upon airport operations, although this court in our recent decision in Corbett v. Eastern Air Lines, opinion filed June 9, 1964, not yet reported, we adverted to that type of action by way of pure obiter dictum.

The constitutional provisions applicable in Florida are consistent with, if they do not affirmatively require, the recognition of the concept of inverse condemnation. In addition to the provisions of the United States Constitution applied in the Causby and Griggs decisions, Section 4 of the Declaration of Rights in the Constitution of Florida provides: "All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay." Section 12 of the Declaration provides in pertinent part: "No person shall. . .be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation. . . ."

On the subject of condemnation Section 29 of Article XVI of the Florida Constitution provides in pertinent part: "No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money. . ."

The concept of inverse condemnation can be readily accepted if we acknowledge the doctrine that a continuing

trespass or nuisance may ripen in to a constitutional taking of property within the ken of constitutional provisions prohibiting the taking of property without the payment of just compensation. Such a doctrine has been recognized in several decisions of the appellate courts of Florida.

For instance, in State Road Department of Florida v. Tharp, 146 Fla: 745, 1 So. 2d 868 (1941), the owner of a water mill filed a suit to restrain the continuing of a trespass by the State Road Department which had erected a bridge and a fill which obstructed channels in which water flowed after it left the millrace, resulting in raising the elevation of the water in the millrace and in reducing the mill's capacity, or to require the department to exercise its right of eminent domain as a means of making restitution to the owner. The said owner contended that the building and maintenance of the fill amounted to a taking of his property without due process of law. The chancellor declined to issue the injunction, but granted to the department the privilege of exercising the right of eminent domain as a means of making restitution to the owner. A motion to dismiss was denied and on final hearing the chancellor granted the relief prayed for; and the department appealed.

In affirming the chancellor's decree in this Tharp case, the Supreme Court of Florida, speaking through the late Justice Terrell, said the following with respect to the basic constitutional issues involved:

> "If a State agency can deliberately trespass on and destroy the property of the citizen in the manner shown to have been done here and then be relieved from making restitution on the plea of nonliability of the State for suit, then the constitutional guaranty of the right to own and dispose of property becomes

nothing more than the tinkling of empty words. Such a holding would raise administrative boards above the law and clothe them with an air of megalomania that would eternally jeopardize the property right of the citizens. It would reverse the order of democracy in this country and head it into a blind alley.

"American democracy is a distinct departure from other democracies in that we place the emphasis on the individual and protect him in his personal property rights against the State and all other assailants. The State may condemn his property for public use and pay a just compensation for it, but it will not be permitted to grab or take it by force and the doctrine of nonsuability should not be so construed. Forceful taking is abhorrent to every democratic impulse and alien to our political concepts.

"If American democracy survives and lives up to the function of its creation, it must do so by adherence to the code of moral and legal conduct promulgated by the Constitution, one provision of which is the sanctity of private property. No principle has contributed more to the material development of the country or done more to stabilize and balance its citizenship. To be a property owner and a taxpayer is one of the surest incentives to a dependable citizenship. It gives the citizen a stake in his government second to no other influence. It is one of the first duties of constitutional government to protect, and where the sovereign has a right to condemn for public use, it will not be permitted to appropriate except by orderly processes. The current of the law on this point will not lead to any other conclusion.

"Supporting this thesis, Section 12 of the Declara-

> tion of Rights provides that no person shall be deprived of his property without just compensation and Section 29 of Article 16 of the Constitution contains a similar specification with reference to corporations and individuals for the preservation of property rights. The latter provision is mandatory that the compensation be made before the property is appropriated."

On the authority of the just-quoted decision of the Supreme Court of Florida, the above-quoted provisions of the Florida Constitution, and the above decisions from other jurisdictions, we hold that in the present case the allegations of the plaintiffs' second amended complaint are sufficient to state a claim for relief — either injunctive relief or by way of inverse condemnation — so that the chancellor correctly denied the defendant's motion to dismiss the said complaint. We also hold that the complaint's allegations attacked by the defendant's motion to strike are both relevant and material to the plaintiffs' cause of action, so that the chancellor correctly denied that motion also. Consequently, the order appealed from herein must be and it is

Affirmed.

WIGGINTON and RAWLS, JJ., CONCUR.

FINAL ORDER

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

GEORGE SCHUMANN, ET AL.,
Plaintiffs,

vs.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,
Defendant.

EDWIN H. BRAIN, ET AL.,
Plaintiffs,

vs.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,
Defendant.

ORDER

This cause came on to be heard upon final hearing, and the Court having heard the witnesses and the argument of counsel for all parties.

The District Court of Appeals for the First District has held that the complaint in this case stated a cause of action for inverse condemnation. The Court also stated that this is a case of first impression in Florida, and it recognized the propriety of inverse condemnation based upon airport operations. As stated in the opinion, "Inverse condemnation has been defined as the popular description of a cause of

action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."

In the opinion, which is reported as *City of Jacksonville, etc., v. George Schumann, et ux, et al.*, 167 So. 2d 95, the case of *Thornburg v. Port of Portland*, 233 Or. 178, 376 P. 2d 100, is quoted as follows:

> "If we accept, as we must upon established principles of the law of servitudes, the validity of the propositions that a noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from above one's land can ripen into a taking if it is persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular.
>
> "If a landowner has a right to be free from unreasonable interference caused by noise, as we hold that he has, then when does the noise burden become so unreasonable that the government must pay for the privilege of being permitted to continue to make the noise? Logically, the answer has to be given by the trier of fact (subject to the usual exercise of the proper function of the court in screening the evidence). See Restatement, Torts, § 826, Comment d."

Then, after mentioning three other cases, the Court said: "'. . . the sole remaining inquiry is whether there exists any legal reason why the rules recognized in those decisions

should not be recognized and applied in Florida. We see no such reason."

The Supreme Court of Florida pointed to the difficulties arising from the widespread use of planes when, in the case of *Brooks et al. v. Patterson, Mayor, et al.* 31 So. 2d 472, they affirmed the Chancellor's decree and said, at page 477, "Under this decree we must assume that the defendants (City) will adopt rules and regulations governing the users of the airport which, among other things, will reasonably prohibit planes being flown over the property of plaintiffs at a height less than will be required to prevent the vibration caused by the operation of the plane, doing damage to the house or other property of either of the plaintiffs, and will also prohibit planes being flown over the property of plaintiffs at a height less than that which will reasonably eliminate shock and fright being reasonably experienced by persons occupying plaintiffs' property." Overflights are not necessary to cause fright, vibrations and noise as they can be experienced regardless of whether the wing tip of the plane passes a few inches over the land or misses it by a few inches or a few yards.

In the matter of liability for smoke and oil from unburned jet fuel, it is interesting to note that even in the earlier cases before the United States Supreme Court, when they held there must be an actual physical invasion before railroads would be held liable for vibrations and noises from the operation of trains, they nevertheless have held such a railroad company liable for damages caused by unnecessary gases and smoke. See: *Richards v. Washington Terminal Co.*, 233 U.S. 546, 58 L.ed. 1088.

From the allegations and testimony, it appears that plaintiffs reside on lands adjacent to or across a road from defendant's airport. Commercial jets regularly use the airport

with approximately 100 jet flights each day, and a part of the airport property is leased to the Florida Air National Guard for the use of its jet fighter planes. On December 11, 1962, the defendant placed in operational service an extended Northeast-Southwest runway to accommodate the larger jet planes and the fighter planes of FANG.

The evidence shows that the noise from the nearby jets occur at, upon and from the extended runway at frequent intervals and at all times of the day or night; that the noise halts personal and 'phone conversation; radio and television reception is disrupted, and the sound obliterated; sleep is disturbed, and the noise is painful to many; the noise also causes fear, particularly in small children; that, in addition to the high pitched whine of the jets on landing, there is a roar on takeoff and frequently a sharp concussion or explosion which occurs when the fighter jets' after-burner is used. That unburned jet fuel leaves a greasy film on cars, swimming pools, clothes, laundry, homes and furnishings; that windows facing the airport must be kept closed winter and summer because of the frequency of the flights; and that a kerosene odor is prevalent. That the jets cause vibrations in the houses and of their contents, causing windows and dishes to rattle, putty in window frames to loosen, pictures to hang askew, shingles on the houses to loosen, and, in some instances, structural damage to the homes in the area. Plaintiffs also complain that when the commercial jets taxi and turn for takeoffs and when the Air National Guard planes go through warmup procedures, dust, small rocks and other debris are blasted directly against their properties. The cutting of trees by the defendant along the road and on properties near the extended runway facilitated the propogation of dust and debris in the area. Residences which abut the warmup pad or parking apron of the FANG have especially suffered from the blasts of dust and other

debris which have sifted into the homes through doors and windows onto floors, carpets, drapes, food, etc.

The accumulated effect of the foregoing elements, occurring with such frequency has, in the opinion of a qualified real estate appraiser, lessened the fair market value of each of the plaintiffs' properties, except the plaintiff Arthur H. Ringel, and as to Mr. Ringel's claim, the complaint will be dismissed. (The Ringel home is not within the area hereinafter discussed.)

Some of the owners have been paid for "clearance easements" which permit the cutting of trees, shrubs and the like, but those easements have no bearing on this case as there was no easement for noise, vibration, etc. "Avigation easements", which have been taken from some of the plaintiffs, are in a different category in that they permit the passage of planes, jets included, over the property and necessarily included the noise, fumes and vibration from such planes. I cannot subscribe to the theory of plaintiffs that when the avigation easement was taken it included only that area within the specific limits of the easement; nor, on the other hand, can I subscribe to the defendant's theory that when the easement was taken, it included everything from that time forward. In the case of avigation easements, if there is any new damage from jet planes which was not anticipated at the time of the avigation easements, and therefore not included in such easements, then such damage must relate from the time of the extension of the Northeast-Southwest runway and be based on facts and conditions not evident when the avigation easements were obtained. If the easements have been extended as plaintiffs claim, then plaintiffs may show such additional taking. Such damage, if any, will be held to be an uncompensated expansion of the existing easement.

Reasonable noise must be endured as the price for living in an industrial society and for having deliberately selected property immediately adjacent to the airport as a homesite, but fairness will require reasonable compensation for operations that immediately, directly and unreasonably limit the use and enjoyment of private property.

In this instance, the noise from the jet aircraft is more than simple "industrial noise" which must be suffered by those who choose to live in an industrial area. The soundtrack admitted into evidence is clear proof of the severity of the noise, although almost everyone is familiar with the penetrating and high pitch sounds of the jet engine. There is little, if any, relationship between the noise emitted from a large jet aircraft and the noise suffered by those who live near a railroad track or a busy highway. It may not constitute an actual complete appropriation of the property, but the creation of disturbances which substantially inerfere with the use and enjoyment of property achieves the same end and the noise, vibrations, concussions, etc. are sufficient to constitute an actionable invasion of the property.

Although plaintiffs, by their bill of complaint, allege that planes overfly their properties, violating their immediate airspace, it is clear that the gravamen of their complaint is the noise, vibration, dust, fumes and exhaust smoke rather than physical invasion of their property. They do not seek recovery for any technical trespass, but for unreasonable interference with the use and enjoyment of their property. In fact, there are no overflights in the case of several plaintiffs.

The defendant argues there must be a "physical invasion" of property before there can be a "taking." Even so, just what constitutes "physical invasion"? If, on lands ad-

jacent to mine, there is an atomic explosion and my house is destroyed by the concussion, has there not been a "physical invasion" of my property by the air blast? Or can it be, as defendant seems to contend, that unless there are overflights which would cause the blast to come to my property from a vertical direction, there can be no recovery? My house is destroyed regardless of whether the direction of the force is vertical, or lateral or horizontal. Surely, if the result is equivalent, the right of recovery should be equivalent. If the explosions frequently reoccur over a period of years, my property would be effectively taken without any other physical invasion.

When the land of an individual is diminished in value for the public benefit, then justice requires that the public pay. When the interference with the use of the land is of sufficient directness, severity, peculiarity and magnitude that the owner is denied the enjoyment of his own property, then fairness and justice requires that he be compensated. Neither these plaintiffs, nor anyone else whose constitutional rights have been denied, are required to yield to the *summum bonum*—the greatest good for the greatest number; unless it appears that their damage is "inconsequential" or "incidental" and not "substantial".

Plaintiffs seek to either enjoin the troublesome flight operations, or to compel the defendant City to condemn an easement "in perpetuity consisting of the right to create noise, vibrations, concussions and sound waves, together with the further right to direct and transmit exhaust fumes, gases, smoke, dust, debris, earth and stones propelled by and/or emitted from aircraft turbo-jet engines from the airport property of the defendant over, across, against and upon the lands of the plaintiffs." (Taken from plaintiffs' contention at final argument.)

From the evidence and the law, it clearly appears there has been a "taking", to some extent, of a temporary easement in the plaintiffs' properties. The big question remaining is just *what* has been taken. The Federal Aviation Agency has recommended that no suburban residential development, or place of public assembly, be constructed within one-half mile of each side of a jet runway nor within 15,000 feet from the end of such runway. I recognize that there must be some arbitrary line beyond which, for practical as well as legal purposes, it cannot be said there has been a "taking". Based on the evidence in this case, one-half mile from each side of the runway is a reasonable limitation, though there may be some inconvenience beyond that point. I do not, however, believe that a distance of nearly three miles from the end of the runway is reasonable, practicable, or necessary, nor is there apt to be a "taking" at such distance. The testimony shows rather positively that jet planes can and do reach an altitude of approximately 1,600 feet within one mile of the end of the runway. However, as none of the present plaintiffs have property more than one-half mile beyond the end of the runway, it is unnecessary to determine the outside limit which might constitute a "taking" beyond the end of the runway, except insofar as it may be pertainent to determine at what point the "one-half mile from each side of the runway" should be terminated: In this particular litigation, a distance of 3,000 feet from the end of the runway, while arbitrary, is also reasonable.

In view of the evidence and the law applicable to this case, there has been a "taking" of a temporary easement in the properties of those plaintiffs which are within one-half mile of each side of the Northeast-Southwest runway, including a distance of 3,000 feet from its Northeast end, for the purpose of permitting any plane to make noises, emit

gases, fumes and smoke, to cause vibration and concussion, and to disturb or blast dust and small particles of matter against and onto plaintiffs' said properties, for the period beginning December 11, 1962, when the Northeast-Southwest runway became operational, until December 11, 1968, at which time all air operations at Imerson Airport should be concluded.

Although I am holding that there has been a "taking", I believe that in such cases as this, where there has been no actual physical invasion of plaintiffs' properties, it is not so much the character of the invasion as the amount of damage which determines whether plaintiffs should be compensated. This must of necessity be true. It is possible that there would be a great amount of actual technical invasion, with little or no resulting damage. In such a situation, the damage may very well be held to have been inconsequential and endurable by the property owner and therefore would not justify the imposition of inverse condemnation. On the other hand, the character of the invasion itself may, when considered by itself, not be unreasonable at all but because of the resulting damage would constitute a severe and remarkable deterioration of the use and enjoyment of the property. Therefore, it is my opinion that plaintiffs are not entitled to be compensated if they have merely suffered simple inconvenience which results from the normal operation of jet planes; airspace in general is a part of the public domain and it may be used by the public so long as no substantial damage is done the landowner. In every home, everywhere in this country, there is the more or less constant noise from airplanes; in every home the TV is disrupted when a plane flies overhead; in every home there is some inconvenience caused by planes — jet and otherwise. To the extent the inhabitants have been inconvenienced, their homeplace has been made that much less

desirable, but there can be no compensation for simple inconvenience. Therefore, plaintiffs are entitled to be compensated for such taking only if they suffer "substantial" damage as distinguished from "consequential" or "incidental" damage. If they have suffered only "consequential" or "incidental" damage, then it will be a case of *dammum absque injuria* for which they cannot be compensated.

Having made this determination, this case must next be instituted as an eminent domain proceeding and a constitutional jury empanelled to determine what, if any, compensation should be paid to the various property owners for the taking.

It has been determined by the Second District Court of Appeal, in the case of *Florida Power Corp. v. McNeely*, 125 So. 2d 311, at page 320, that "Such condemnation hearing cannot be conducted as an incident to the main proceedings in equity; but; in order that the requirements of the eminent domain statutes be fulfilled, an independent action in condemnation is required." Therefore, the defendant, City of Jacksonville, will be directed to institute condemnation proceedings for the acquisition of such temporary easement and to pay therefor such amounts, if any, as may be determined by the jury.

Because large airports attract business, industry and residences, it is hoped that in building the new airport facilities, the City will acquire enough property and/or easements for airport purposes and that the County will appropriately zone the adjacent surrounding area, so that a new industrial complex, oriented to space and aviation industry, can be established without the necessity for further suits of this nature.

(NOTE: Although I have tried to rationalize the above arguments in keeping with the language in the case of *City of Jacksonville v. Schumann, supra,* I would personally favor the reasoning and logic as expressed by the author of the article, "Noise and the Law", appearing in Volume 63, Michigan Law Review 1373. However, if the Schumann decision is to be changed, it must be done at appellate levels and not in the trial court.)

It is thereupon, upon consideration,

ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiffs Arthur H. Ringel and Pearl Z. Ringel, his wife, shall be and the same is hereby dismissed.

It is further

ORDERED, ADJUDGED AND DECREED that the defendant, City of Jacksonville, shall be and it is hereby directed to institute eminent domain proceedings within sixty (60) days from the date of this Order to condemn a temporary easement which it has taken in fact in the properties of those plaintiffs which are within one-half mile of each side of the Northeast-Southwest runway, including a distance of 3,000 feet from its Northeast end, for the purpose of permitting any plane to make noises, emit gases, fumes and smoke, to cause vibration and concussion, and to disturb or blast dust and small particles of matter against and onto plaintiffs' said properties, for the period beginning December 11, 1962, and ending December 11, 1968; as to those properties in which the defendant now holds an avigation easement, the defendant is hereby directed to institute such proceedings to obtain the additional easement it has taken by virtue of the extended runway during the aforesaid period; and in each case a jury shall determine what, if

any, compensation shall be paid such property owner for such easement.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, this 26th day of January, A. D. 1966.

/s/ Charles A. Luckie

JUDGE

DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

199 So. 2d 727

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Appellant,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Appellees.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Appellant,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Appellees.

DECISION

JOHNSON, J.

This is an appeal from a decree of the Circuit Court of Duval County, wherein the case George Schumann, et al v. City of Jacksonville, in one case and Edwin H. Brain, et al v. City of Jacksonville, in the other case, were consolidated for trial and on this appeal.

From an order directing the City to institute eminent domain proceedings in accordance with the prayer of the complaints, the City, appellant herein, appeals. The same order or decree was entered in each of the two cases.

The basic question before us now is whether there was sufficient evidence before the trial court to support the allegations of the complaint. The trial court took testimony for about three days. At the conclusion thereof, he determined that certain plaintiffs, five in number, had given avigation easements over the surface of their respective properties in contemplation of the defendant's extension of one of its runways, and therefore summary judgments were entered against them. Others had years earlier given certain avigation easements, also, but prior to changes made in the operation and extension of the airport which could not have been reasonably expected at the time of giving such easements. As to these properties and plaintiffs, the trial court made special limitation as to their damages, if any, by limiting them to the unexpected new aggravations and new easements taken.

This cause has been before this court previously on an interlocutory appeal[1] from an order denying a motion to dismiss the amended complaint on the primary ground that said complaint failed to state a cause of action. This court, speaking through Honorable Donald K. Carroll, in said case, gave a very comprehensive review of the basic question involved in that cause, which is of course the same as here. This court determined that the complaint stated a cause of action for inverse condemnation, but pointed out further that under other provisions of our constitution, that regardless of what it was called,[2] the damaged property owner was entitled to compensation when his property was taken or its beneficial use to such owner destroyed.

---

(1) City of Jacksonville, v. George Schumann, et al., 167 So. 2d 95, (Fla. App. 1st, 1964).

(2) Section 4, Declaration of Rights, Florida Constitution and Section 12, Declaration of Rights, Florida Constitution.

In view of the decision by this court, supra, we are, as pointed out earlier, confronted only with the factual situation as it appears from the testimony and whether the trial judge, before whom the testimony was taken, without a jury, rendered a proper determination based thereon.

We think the trial court did an excellent job in deciphering all the evidence, some of which tended to be conflicting, and rendered a decision in which we cannot find fault and with which we agree.

In arriving at our conclusion, we point out that not all plaintiffs may receive compensation. The amount of damages must be determined by a jury in another proceeding in circuit court. The trial court herein only determined that the plaintiffs, except those against whom summary judgment had been rendered, each had a valid legal cause of action for damages under the allegations of the complaint and the evidence in support thereof, properly leaving the question of amount, if any, due each plaintiff to be fixed by the jury in the subsequent trial of this issue.

While the issue of inverse condemnation in airport aviation projects was a novel one in Florida, at the time this court rendered its decision in the former appearance of this case before this court (167 So. 2d 95, supra), we think the issue has now been settled by that decision, in which the Supreme Court of Florida denied certiorari, and which committed Florida to the view adopted in Thornburg v. Port of Portland,[3] Martin v. Port of Seattle,[4] and the two United States Supreme Court cases of United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L.Ed. 1206, and Griggs v. Allegheny County, 369 U. S. 84, 82 S. Ct. 531, 7 L.Ed. 2d 585

---

(3) Thornburg v. Port of Portland, 233 Or. 178, 376 P. 2d 100 (1962).

(4) Martin v. Port of Seattle, 391 P. 2d 540 (Wash. 1964).

(1962). In these cases, it is in substance held that noise can be a nuisance and that such nuisance can give rise to an easement, and that such noise may come straight down from above, or from some other direction. That the land owner has a right to be free from unreasonable interference caused by the noise, and if such noise and/or intense vibration produced by low flying aircraft deprived such owner of an essential element in his relationship to his land, compensation therefor should be made by the public authority responsible therefor, and it makes no difference whether the public or condemning authority is the movant or the land owner, through a process similar to that employed in this case by the plaintiffs.

Most of the arguments raised by appellant are similar to those raised in and settled by this court in the first appearance of this case before this court. A repetition thereof in this opinion to any further extent than already made, would serve no good purpose.

We think the evidence supported the finding of the trial court inview of the guidelines laid down by this court in its first decision in this case when here on interlocutory appeal.

Appellant's points one, three and five, as raised in its brief, have been answered above and adversely to the appellant.

As to appellant's point two, we think this point has also been laid to rest by the decision in Griggs v. Allegheny County, supra, and is therefore without merit.

We think we have partly dealt with appellant's point five, but here reiterate that the trial court made a broad finding as to those plaintiffs who had given "avigation ease-

ments." In substance, the court's order was to the effect that each plaintiff's problem had to be treated in the light of the easement given, as to its substance and time of giving thereof. He did not rule that all such would receive damages, but left the element of damages, if any, to the jury to be later empanelled to try such issue. We can find no error committed by the learned trial judge, but on the contrary think his decree was well thought out, well worded and very comprehensive in its coverage of the facts and we agree with his decree and therefore affirm the same.

The City of Jacksonville v. Edwin H. Brain, et al, being our case numbered I-142, was consolidated for trial and for purpose of appeal herein, with the Schumann case, supra. In appellant's brief four points are raised in which error is contended. These points are identical to four points raised in the Schumann case and which points we have treated supra. The same reasoning applies equally to both cases with the same ultimate decision from both the trial court and this court. We see no reason for disturbing the trial court's finding of fact nor his application of the appropriate law thereto.

In both cases, the trial court ordered the defendant (appellant) to institute eminent domain proceedings within 60 days to condemn the necessary easements.

We affirm this decree in both cases.

WIGGINTON, ACTING CHIEF JUDGE, and SPECTOR, J. CONCUR.

DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Appellant,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Appellees.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Appellant,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Appellees.

ORDER

Appellant's Petition for Rehearing in the above styled cause having been considered,

IT IS ORDERED that the Petition be and the same is hereby denied.

WITNESS the Honorable John T. Wigginton, Chief Judge, and Seal of the Court this 10th day of July, A. D. 1967.

DISTRICT COURT OF APPEAL
FIRST DISTRICT, OF FLORIDA

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Appellant,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Appellees.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Appellant,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Appellees.

ORDER

Appellant's suggestion that decision be certified as passing upon a question of great public interest having been considered,

IT IS ORDERED that the suggestion be and the same is hereby denied.

WITNESS the Honorable John T. Wigginton, Chief Judge, and Seal of the Court this 10th day of July, A. D. 1967.

SUPREME COURT OF FLORIDA

OCTOBER 5, 1967

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Respondents.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and he same is hereby denied.

SUPREME COURT OF FLORIDA

NOVEMBER 1, 1967

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Respondents.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Respondents.

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby denied.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 21 1968
JOHN F. DAVIS, CLERK

NO. 1058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Respondents.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

John S. Duss
400 Barnett National Bank Building
Jacksonville, Florida 32202
Counsel for Respondents Schumann, et al.

W. D. Jones, Jr.
337 Florida Bank Building
Jacksonville, Florida 32202
Counsel for Respondents Brain, et al.

INDEX

	Page
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	
I. State Court Findings of Fact Are Not Reviewable.	6
II. There Are No New or Important Questions of Federal Law.	8
III. The Questions Presented Are Not of Importance.	10
IV. The Decision Below is Clearly Correct.	11
Conclusion	12

TABLE OF CASES

Ackerman v. Port of Seattle, 55 Wn. (2d) 400, 348 P.(2d) 664 (1960)	11
Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897)	8
Avery v. United States, (Ct. Cl. 1964), 330 F.2d 640	11
Batten v. United States, (Tenth Circuit 1962) 306 F.2d 580	11
City of Jacksonville v. Schumann, (Fla. App. 1964) 167 So.2d 95	1, 4
City of Jacksonville v. Schumann, (Fla. App. 1967) 199 So.2d. 727	2, 6
Griggs v. County of Allegheny, 369 U.S. 84 (1962)	4, 6, 8, 10

TABLE OF CASES—Continued

	Page
Manley v .Park, 187 U.S. 547 (1903)	7
Martin v. Port of Seattle, 64 Wn.2d 390, 391 P.2d 540 (1964)	4, 11
Port of Seattle v. Glenn A. Martin, et al, 379 U.S. 989 (January 25, 1965)	11
Portsmouth Harbor Land and Hotel Co. v. United States, 260 U.S. 327 (1922)	9
Richards v. Washington Terminal Co., 233 U.S. 546 (1914)	9
Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937)	7
St. Louis v. S.W.R. Co. v. Nattin, 277 U.S. 157 (1928)	8
Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962)	4, 11
United States v. Causby, 328 U.S. 256 (1946)	4, 8
STATUTES	
49 U.S.C., 1112(a)(2)	10
49 U.S.C., 1506	9
CONSTITUTIONS	
Florida Constitution:	
Declaration of Rights, Sections 4 and 12	3
Article XVI, Section 29	3, 7
United States Constitution:	
Amendment XIV	3

NO. 1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Respondents.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of Appeal upon Petitioner's interlocutory appeal (Appendix B of the Petition) is reported at 167 So.2d 95. The final order and opinion of the trial court (R 79, and Appendix B of the Petition) is unreported. The opinion of the District Court of Appeal

on Final Judgment (Appendix B of the Petition) is reported at 199 So.2d 727. The refusal of the Supreme Court of Florida to grant certiorari (Appendix B of the Petition) is unreported.

JURISDICTION

The jurisdictional requisite is adequately set forth in the petition.

QUESTIONS PRESENTED

Inasmuch as the first two questions presented, urged by the petitioner, are based upon inadequate or erroneous factual hypotheses, Respondents state the questions presented to be more properly as follows:

I

Is recovery of just compensation by a property owner from an airport owner and operator for a constitutional taking arising out of low flights of jet aircraft, and their attendant noise, vibrations, smoke and the like, which has substantially impaired the use and enjoyment of such owner's property and substantially reduced its value, precluded by the Federal Aviation Act of 1958 creating a public right of freedom of transit through the navigable air space?

II

Does the recovery against an airport owner and operator by a landowner whose property has been taken in the constitutional sense, create an unreasonable burden on interstate and foreign commerce?

The petition nowhere substantiates any of the premises

set forth as the basis for the third question presented by the petitioner. This litigation involves eminent domain and does not sound in tort. In any event, the question is so insubstantial as not to merit comment.

STATEMENT OF THE CASE

This is an "inverse condemnation" action brought by some thirty property owners (mostly husbands and wives) against the City of Jacksonville, a municipal corporation, as the owner and operator of the Jacksonville Municipal Airport. Respondents seek compensation under Sections 4 and 12 of the Declaration of Rights of the Florida Constitution and under Article XVI, Section 29, of the Florida Constitution, and under Amendment XIV of the United States Constitution, for a taking of their property for public use resulting from low flights of jet aircraft in landing upon and taking off from the Northeast-Southwest (instrument) runway of the airport. Respondents' homes lie within an area one-half mile on each side of the Northeast-Southwest runway, including a distance of 3,000 feet from its northeast end, as determined by the trial court (R 90) (Appendix B of Petition, page 47).

In May 1962, at petitioner's request and with its consent and approval, the Northeast-Southwest runway was extended some fifteen hundred feet in a northeasterly direction toward the respondents' homes (R 173). The extended runway became operational on December 11, 1962. Most commercial jet aircraft and jet fighter planes of the Florida Air National Guard, which leases a part of the airport property from the petitioner, make extensive use of the Northeast-Southwest runway.

Upon the filing of the complaint, Petitioner moved to

dismiss on the ground that the complaint failed to state a cause of action. The trial court denied the motion and petitioner took an interlocutory appeal, urging upon the District Court of Appeal that there had not been a "taking" of the respondents' properties within the meaning of the Constitution of Florida or within the meaning of the Constitution of the United States, inasmuch as there could not possibly be overflights in respect to all of the respondents' properties and that the noise, vibrations, concussions, fumes and the like did not constitute a physical invasion amounting to a complete ouster of the landowners. The District Court of Appeal affirmed the trial court at 167 So.2d 95 (Appendix B of the Petition) relying upon *United States v. Causby*, 328 U.S. 256 (1946), *Griggs v. County of Allegheny*, 369 U. S. 84 (1962), *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962) and *Martin v. Port of Seattle*, 64 Wash.2d 390, 391 P.2d 540 (1964). In the latter two cases, the Supreme Courts of Oregon and Washington held that noise, if frequently enough inflicted, can amount to a nuisance and that a noise-nuisance can amount to a taking, in a constitutional sense, regardless of the direction from which it comes.

Petitioner sought certiorari in the Supreme Court of Florida of the decision of the District Court of Appeal. Certiorari was denied. Thereupon, the cause was remanded to the trial court for trial on the merits.

The trial court found as follows:

> "The evidence shows that the noise from the nearby jets occurs at, upon and from the extended runway at frequent intervals and at all times of the day or night; that the noise halts personal and 'phone conversation; radio and television reception is disrupted, and the sound obliterated; sleep is disturbed, and the noise is painful to many; the noise also causes fear,

particularly in small children; that, in addition to the high pitched whine of the jets on landing, there is a roar on takeoff and frequently a sharp concussion or explosion which occurs when the fighter jets' after-burner is used. That unburned jet fuel leaves a greasy film on cars, swimming pools, clothes, laundry, homes and furnishings; that windows facing the airport must be kept closed winter and summer because of the frequency of the flights; and that a kerosene odor is prevalent. That the jets cause vibrations in the houses and of their contents, causing windows and dishes to rattle, putty in window frames to loosen, pictures to hang askew, shingles on the houses to loosen, and, in some instances, structural damage to the homes in the area. Plaintiffs also complaint that when the commercial jets taxi and turn for takeoffs and when the Air National Guard planes go through warmup procedures, dust, small rocks and other debris are blasted directly against their properties.****

"The accumulated effect of the foregoing elements, occurring with such frequency has, in the opinion of a qualified real estate appraiser, lessened the fair market value of each of the plaintiffs' properties, ... "

During the course of the litigation, the petitioner was granted leave to file a supplemental answer (R 45-47 and R 50) stating that pursuant to a Special Bond Election, it had embarked upon the construction and eventual operation of a new municipal airport which it planned to open for filght operations in the year 1968, whereupon the existing airport would cease operating. At the conclusion of the trial, the court having found that a "taking" of an easement in the properties of the respondents had occurred, directed the petitioner to institute eminent domain proceedings within

sixty (60) days from the date of the order to condemn a temporary easement for the period commencing December 11, 1962, and ending December 11, 1968, in respect to the properties of the respondents which are within one-half mile of each side of the Northeast-Southwest runway, including a distance of 3,000 feet from its northeast end, for the purpose of permitting any plane to make noises, emit gases, fumes and smoke, to cause vibration and concussion, and to disturb or blast dust and small particles of matter against and onto respondents' said properties.

The trial court's decision was affirmed by a unanimous court, *City of Jacksonville v. Schumann*, Florida Appellate 1967, 199 So.2d 727, (Appendix B of Petition, page 49). The Supreme Court of Florida denied certiorari (Appendix B of Petition, pages 56-57).

ARGUMENT

I

STATE COURT FINDINGS OF FACTS ARE NOT REVIEWABLE.

The Florida Courts in this case held that there had been a constitutional taking of respondents' properties by the City of Jacksonville. Implicit in the petition is the fact that petitioner accepts the rulings of *Griggs* (supra). That case holds that the enactment of the Federal Aviation Act of 1958 did not, and does not, totally preclude noise damage claims by landowners.

Specifically, petitioner asks whether the Congress intended, by the enactment of the Federal Aviation Act of 1958,

to preclude noise claims arising out of flights over 500 feet. The record is clear that the properties in question are all subject to regular and frequent flights below 500 feet. (R 235, 247, 254, 505, 506, 519) Secondly, petitioner asks whether Congress intended to preclude noise damage from flights not directly over the respondents' properties. It fails to make clear that all such properties lie within an area much smaller than that recommended by the Federal Aviation Agency for non-residential development. The interference with the use of respondents' land is of the same directness and magnitude as though overflights existed. The Florida Courts held that the absence of a technical trespass did not preclude these respondents from recovering within the meaning of Article XVI, Section 29, of the Florida Constitution, which provides for just compensation for a "taking" of private property for public use.

The construction and application of a State Constitution by the highest court of that State is conclusive. *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937); *Manley v. Park*, 187 U.S. 547 (1903).

Petitioner contends that the construction of the Florida Constitution by the Florida courts imposes an unreasonable burden upon commerce (Petition, page 3). The only possible effect, however, is the obligation of paying just compensation which only arises when and if the airport owner and operator fails to acquire adequate property interests for the airport approach areas. This event constitutes, at most, an incidental, non-discriminatory, non-recurring economic impact upon commerce which in no way obstructs the movement, or the Federal regulation, of air traffic. In another field, it has been consistently held that a state may constitutionally levy general taxes upon property of those engaged

in interstate commerce, even though the economic effect of such levy is direct, inevitable and recurring. *St. Louis and S. W. R. Co. v. Nattin*, 277 U.S. 157 (1928); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897).

Petitioner's third attempt to secure a review is premised upon an alleged deficiency in the determination by the trial court that the fair market value of respondents' properties had been lessened rather than destroyed, and that none of respondents had "moved from their property as a result of the airport". (Petition, page 13) Petitioner fails to mention that the trial court, in its order, determined that, in a subsequent eminent domain proceeding, respondents will be compensated for such taking only if they suffer "substantial" damage as distinguished from "consequential" or "incidental" damage (Appendix B of Petition, page 46). Furthermore, actual abandonment of property is not a prerequisite to a constitutional taking. See *Causby*, in which the aircraft flights which disrupted Mr. Causby's chicken business did not force him to move away. This Court held that uninhabitability was not required for a constitutional taking, it being sufficient that the utility of the land had been limited and its value diminished.

II

THERE ARE NO NEW OR IMPORTANT QUESTIONS OF FEDERAL LAW.

Petitioner's adherence to *Griggs* is, in effect, an admission that noise claims are not barred by the congressional enactment of the Federal Aviation Act of 1958. Assuming that the facts in this case extend to some degree beyond *Causby* and *Griggs*, petitioner manifestly has failed to demonstrate how such facts, as found by the Florida Courts to constitute a constitutional taking, conflict with congressional intent as

expressed in the Federal Aviation Act. The Florida decisions in this case fully accord with the right of freedom of transit and in no way impede Federal regulation of air commence. Demonstrably, the Federal Aviation Act of 1958 did not purport to abrogate state remedies in favor of landowners, as Section 1506 states:

> "Nothing contained in this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies.' 72 Stat. 798, 40 USC 1506.

In any event, as early as 1914, this Court held in *Richards v. Washington Terminal Co.*, 233 U.S. 546, (Appendix B of Petition, p. 39) that a property owner in the neighborhood of, but not abutting upon railroad tracks, was entitled to recover for the peculiar damages accruing to his property which resulted from the use of a fanning system operated by the Terminal Company which forced gases and smoke from a railroad tunnel so near his property as to render it less habitable than it would otherwise be. And in *Portsmouth Harbor Land and Hotel Co. v. United States,* 260 U.S. 327 (1922), this Court found no difficulty in holding that the installation of an artillery battery on an elevation, with a purpose and effect of subordinating the strip of land between the battery and the sea to the right of the government to fire projectiles, for the purpose of practice or otherwise, with the result of depriving the owner of the land of its profitable use, imposed a servitude upon such land constituting a taking of property for which compensation should be made. It is, thus, abundantly clear that the decisions of the Florida Courts in this litigation are completely consistent with Federal decisions on the subject of "taking" in a constitutional sense.

III

THE QUESTION PRESENTED IS NOT OF IMPORTANCE.

Petitioner says this case is "of extreme national importance" (Petition, page 10) but fails to document this claim, except to complain inferentially of its potential liability to the respondents. The Florida Courts refused to consider this case as involving a question of "great public interest". (Appendix B of Petition, p. 55)

The Federal Government has consistently followed a policy of acquiring, by purchase or condemnation, easements and other property interests in areas adjacent to military air fields. On the civilian side, a Federal Agency, namely, the Federal Aviation Agency, an expert in the field of air transportation, has, in its Aircraft Noise Abatement Planning Series, Item 3, September 2, 1960, (Respondents' Exhibit No. 7, R 183) (Appendix B of Petition, page 44), recommended that no suburban residential development, or place of public assembly, be permitted within an area at the end of airport runways which is three times as long as the area defined by the trial court as being eligible for compensation. Furthermore, as this Court has noted in *Griggs*, Congress has provided in 49 USC, Section 1112(a)(2), for payments to the owners (municipal or otherwise) of airports for the "costs of acquiring land or interests therein or easements through or other interests in air space."

Petitioner's warning that if ".... states were free to construe the 'taking' provisions of their constitutions...." (Petition, page 10), jet air travel would be destroyed or burdened with exorbitant landing fees to reimburse airport operators for the expense of acquiring easements for "incidental" injury is but a naked plea for an advisory opinion from

this Court. It amounts to an invitation for this Court to go beyond the record in this case. It ignores the fact that respondents' properties are within a strictly delimited area and that the trial court specifically determined that no respondent should recover for "incidental" damage or injury. To the extent that a Federal question is involved in this cause, the same is not one of great substance, and the decision of the Florida Courts accords with applicable decisions of this Court. There is no direct conflict with *Batten v. United States.* 306 F2d 580 (1962), Cert. den. 371 U.S. 955, or with *Avery v. United States,* 330 F.2d 640 (1964).

IV

THE DECISION BELOW IS CLEARLY CORRECT.

Both at the pleading stage and upon trial on the merits, petitioner sought review of all points which it deemed worthy of consideration by the highest court of this State, all to no avail. This case was determined in accordance with *Causby, Griggs, Ackerman v. Port of Seattle,* 55 Wn.(2d) 400, 348 P.2d 664 (1960), *Thornburg* and *Martin.*

The Supreme Courts of Oregon and Washington in *Thornburg* and *Martin,* respectively, both determined upon facts nearly identical to those in this case that an airport operator, situated as petitioner is here, had not by constitutional standards acquired sufficient and adequate property interests from adjacent owners. When review of the *Martin* case was sought in this Court, certiorari was denied, *Port of Seattle v. Glenn A Martin, et al.,* 379 U.S. 989 (January 25, 1965). The findings of the Florida courts in the decision below fall squarely within the principles enumerated in the cases above cited and the decision below correctly held that respondents are entitled to just compensation for the taking of their property.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN S. DUSS
Counsel for respondents Schumann, et al
409 Barnett National Bank Building
Jacksonville, Florida 32202

W. D. JONES, JR.
Counsel for respondents Brain, et al
937 Florida Bank Building
Jacksonville, Florida 32202